Lew Ban Kin v Dato' Sin Yoong Ming

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S-22NCVC-33 OF 2011
ZABARIAH MOHD YUSOF J
28 OCTOBER 2010

Contract — Acceptence — Signature — Recovery of money — Defendant held money as stakeholder — Defendant denied being stakeholder for said money — Allegation that receipt of money was pursuant to consultancy agreement — Plaintiff denied signing any consultancy agreement or terms and contents of agreement read to him by defendant — Whether plaintiff agreed to terms of consultancy agreement — Whether agreement read and explained to plaintiff before execution — Whether defendant fulfilled his obligations under agreement — Whether plaintiff had right to recover said money paid to defendant — Who was stakeholder in agreement

The plaintiff claimed against the defendant for the recovery of RM1.6m which the plaintiff had paid to the defendant to obtain three operational gaming licenses. The plaintiff said that the payment was to be held by the defendant (who at that point in time was acting as the plaintiff's solicitors) as stakeholder until the plaintiff succeeded in obtaining the operational gaming license. As the plaintiff was no longer interested to obtain the gaming license, he had requested the defendant for the refund of the said money. However, the defendant had refused to refund the said amount and hence this action by the plaintiff to recover the said sum. The defendant however, denied that he was the stakeholder of the said sum. He stated that as far as the receipt of the money was concern, it was pursuant to a consultancy agreement dated 12 April 2010 ('the agreement'). The defendant maintained that the plaintiff had signed the agreement after the terms were read and explained to him. Since the plaintiff had signed the agreement, the monies that were paid by the plaintiff had been remitted to the solicitors for the consultants in accordance to the terms in the agreement. The plaintiff on the other hand denied that he had signed any consultancy agreement or that the terms and contents of the agreement had been read over to him by the defendant. The issues for the determination of the court were as follows: (i) whether the plaintiff had agreed to the terms of the agreement dated 12 April 2010; (ii) whether the agreement had been read and explained to the plaintiff before he executed it; (iii) whether the plaintiff had the right to recover the said sum which had been paid to the defendant; (iv) whether the defendant had fulfilled his obligations under the agreement dated 12 April 2010; and (v) who was the stakeholder in the agreement.

Held, allowing the plaintiff's claim with costs:

(1) The defendant was unsure of what happened. At first he said that the

agreement was stamped but subsequently he changed his testimony by saying that the agreement was never stamped. This supports the evidence of PW1 when he said that he was never given a copy of the stamped agreement. This was a pertinent point because by virtue of s 52 of the Stamp Act 1949, agreements which are not stamped cannot be admitted in evidence unless there is payment of late penalty and the duty is paid and is tendered in court. In our present case there was no evidence of any late penalty paid. Given the circumstances, the fact that the agreement was unstamped rendered it inadmissible (see para 39).

(2) The defendant was also not sure who drafted the agreement. At first, he said that the agreement was jointly drafted by him and the consultant's solicitors. Subsequently he said that the truth was that the agreement was drafted by the consultant's lawyer. The defendant was not even sure who he was representing at the material time, ie, whether he was representing the plaintiff or the consultant. Earlier in his evidence the defendant confirmed that the plaintiff was his client, however from the letter at Bundle C, the defendant was referring to the consultants as his client. Clearly from the defendant's testimony above, he was confused as to his role (see paras 40–43).

(3) With regards to the said money, the defendant stated that the sum was kept by the consultant's solicitors, Messrs Gan & Tey, as stakeholder and it was never kept by him or his firm. It was incredible that the defendant could not recollect the amount of monies that he paid to Messrs Gan & Tey considering that it happened not too long ago and the amount was no small amount. One would have thought that the defendant, being an advocate and solicitor, would be armed with documents to show how much he had received and how much he had paid to Messrs Gan & Tey. In this case, the defendant was giving unsubstantiated, unsure oral testimonies. Apart from the defendant's oral testimony, there was no evidence to show that the defendant did pay out this amount to the consultant's solicitors. There was also no evidence of any correspondence between the defendant and Messrs Gan & Tey with regards to this payment of RM1.6m (see paras 44, 47–48).

(4) The defendant in his evidence also said that Dato' Frankie Ng Meng Kooi was transferring the gaming licenses to the plaintiff. If what the defendant said in his testimony was taken to be true, there was no transfer agreement or a sale and purchase agreement of the gaming license. What was before the court was the agreement of P1, which was not a transfer agreement neither was it a sales and purchase agreement. Nowhere in the agreement does it state that the gaming licenses belong to the Dato' Frankie Ng Meng Kooi nor was Dato' Frankie Ng Meng Kooi selling or

transferring the same to the plaintiff. There was nothing stated about any transfers of licenses in the letters from the Ministry of Finance (see paras 51–53 & 55).

(5) The defendant said that Dato' Frankie Ng Meng Kooi was the stakeholder pursuant to the terms of the agreement. However the agreement was not admissible. The consultant had passed away and Mr Gan Eng Loke was not called to testify as to what actually happened, of which this court draws an adverse inference against the defendant under s 114(g) of the Evidence Act 1950. There was no reason to disbelieve the evidence of the plaintiff as opposed to the defendant's evidence which was full of uncertainties and mostly unsubstantiated. The defendant's testimony on the whole lacked credibility. The court was more inclined to believe the evidence of the plaintiff that he gave the money to the defendant to be held as stakeholder pending the gaming licenses being obtained (see paras 63–65).

(6) There was no proof that the gaming licenses were ever obtained. Hence, the happening of the future event did not materialise which means that the defendant who held the money as stakeholder ought to return the monies to the plaintiff (see para 66).

[Bahasa Malaysia summary

Plaintif mendakwa terhadap defendan untuk mendapatkan kembali RM1.6 juta yang dibayar oleh plaintif kepada defendan untuk mendapatkan tiga lesen operasi perjudian. Plaintif mengatakan bahawa bayaran tersebut dipegang oleh defendan (yang pada masa tersebut bertindak sebagai peguamcara plaintif) sebagai pemegang amanah sehingga plaintif berjaya mendapatkan lesen operasi perjudian. Memandangkan plaintif tidak lagi berminat untuk mendapatkan lesen perjudian, dia telah meminta defendan untuk memulangkan wang tersebut. Namun begitu, defendan enggan untuk memulangkan jumlah tersebut dan oleh itu, tindakan ini dibuat oleh plaintif untuk mendapatkan kembali jumlah tersebut. Defendan bagaimanapun, menafikan bahawa dia merupakan pemegang amanah bagi jumlah tersebut. Dia mengatakan bahawa penerimaan wang tersebut adalah menurut satu perjanjian perundingan bertarikh 12 April 2010 ('perjanjian'). Defendan menegaskan bahawa plaintif telah menandatangani perjanjian selepas syarat-syarat dibaca dan diterangkan kepadanya. Memandangkan plaintif telah menandatangani perjanjian, wang yang dibayar oleh plaintif telah diremit kepada peguamcara yang bertindak untuk perunding-perunding menurut syarat-syarat perjanjian. Plaintif bagaimanapun menafikan bahawa dia menandatangani mana-mana perjanjian perundingan atau bahawa syarat-syarat dan isi kandungan perjanjian telah dibacakan kepadanya oleh defendan. Isu-isu untuk ditentukan oleh mahkamah adalah seperti berikut: (i) sama ada plaintif bersetuju dengan syarat-syarat perjanjian bertarikh 12 April 2010; (ii) sama ada perjanjian tersebut telah dibacakan dan diterangkan kepada plaintif sebelum

ditandatangani olehnya; (iii) sama ada plaintif berhak untuk mendapatkan kembali jumlah tersebut yang telah dibayar kepada defendan; (iv) sama ada defendan telah memenuhi tanggungjawabnya di bawah perjanjian bertarikh 12 April 2010; dan (v) siapa yang merupakan pemegang amanah di dalam perjanjian tersebut.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Defendan tidak pasti dengan apa yang berlaku. Pada mulanya dia mengatakan bahawa perjanjian tersebut telah disetem tetapi kemudiannya dia mengubah keterangannya dengan mengatakan bahawa perjanjian tersebut tidak pernah disetem. Ini menyokong keterangan PW1 apabila dia mengatakan bahawa dia tidak pernah diberikan salinan perjanjian yang disetem. Ini merupakan perkara utama kerana menurut s 52 Akta Setem 1949, perjanjian-perjanjian yang tidak disetem tidak boleh diterima sebagai keterangan melainkan terdapat bayaran penalti kelewatan, duti dibayar dan dikemukakan di mahkamah. Di dalam kes ini tidak terdapat keterangan mengenai sebarang penalti kelewatan dibayar. Melihat kepada keadaan persekitaran, fakta bahawa perjanjian tersebut tidak disetemkan menjadikannya tidak boleh diterimapakai (lihat perenggan 39).

(2) Defendan juga tidak pasti siapa yang mendraf perjanjian tersebut. Pada mulanya, dia mengatakan bahawa perjanjian tersebut didraf bersama olehnya dan peguamcara perunding-perunding. Selanjutnya dia menyatakan bahawa sebenarnya perjanjian tersebut didraf oleh peguamcara perunding-perunding. Malah, defendan tidak pasti siapa yang diwakili olehnya pada masa material, iaitu, sama ada dia mewakili plaintif atau perunding-perunding. Terdahulu di dalam keterangannya, defendan mengakui bahawa plaintif merupakan kliennya, walau bagaimanapun daripada surat dalam Ikatan C, defendan merujuk kepada perunding-perunding sebagai kliennya. Adalah jelas daripada keterangan defendan di atas, dia keliru mengenai peranannya (lihat perenggan 40–43).

(3) Berhubung dengan wang tersebut, defendan mengatakan bahawa jumlah tersebut disimpan oleh peguamcara perunding-perunding, Tetuan Gan & Tey, sebagai pemegang amanah dan wang tersebut tidak pernah disimpan olehnya atau firmanya. Amat menakjubkan apabila defendan tidak dapat mengingati jumlah wang yang dibayar kepada Tetuan Gan & Tey apabila menimbangkan bahawa ia berlaku tidak lama dahulu dan jumlahnya bukanlah kecil. Seseorang sudah pasti beranggapan bahawa defendan, sebagai seorang peguamcara dan peguambela, akan dilengkapi dengan dokumen-dokumen untuk menunjukkan sebanyak mana dia menerima dan sebanyak mana dia membayar kepada Tetuan Gan & Tey. Di dalam kes ini, defendan memberikan keterangan lisan yang tidak

berasas dan tidak pasti. Selain daripada keterangan lisan defendan, tidak terdapat keterangan menunjukkan bahawa defendan membayar jumlah tersebut kepada peguamcara perunding-perunding. Tidak terdapat sebarang keterangan mengenai surat-menyurat di antara defendan dan Tetuan Gan & Tey berhubung bayaran RM1.6 juta (lihat perenggan 44, 47–48).

(4) Defendan dalam keterangannya juga mengatakan bahawa Dato' Frankie Ng Meng Kooi memindahkan lesen-lesen perjudian kepada plaintif. Sekiranya apa yang dikatakan oleh defendan di dalam keterangannya dianggap sebagai benar, tidak terdapat perjanjian pindahan atau perjanjian jual dan beli lesen perjudian. Apa yang dikemukakan di mahkamah ialah perjanjian P1, yang bukan merupakan perjanjian pindahan mahupun perjanjian jual dan beli. Tidak dinyatakan di mana-mana di dalam perjanjian tersebut bahawa lesen-lesen perjudian milik Dato' Frankie Ng Meng Kooi ataupun Dato' Frankie Ng Meng Kooi menjual atau memindahkan lesen-lesen perjudian tersebut kepada plaintif. Tiada apa yang dinyatakan mengenai sebarang pindahan lesen-lesen di dalam surat-surat daripada Kementerian Kewangan (lihat perenggan 51–53 & 55).

(5) Defendan mengatakan bahawa Dato' Frankie Ng Meng Kooi merupakan pemegang amanah menurut syarat-syarat perjanjian. Walau bagaimanapun, perjanjian tersebut tidak boleh diterima. Perunding-perunding telahpun meninggal dunia dan Encik Gan Eng Loke tidak dipanggil untuk memberikan keterangan mengenai apa yang sebenarnya terjadi, maka mahkamah ini membuat penghakiman bertentangan terhadap defendan di bawah s 114(g) Akta Keterangan 1950. Tidak terdapat sebarang alasan untuk tidak mempercayai keterangan plaintif melawan keterangan defendan yang penuh dengan ketidakpastian dan kebanyakannya tidak berasas. Keterangan defendan secara keseluruhannya tidak mempunyai kredibiliti. Mahkamah ini lebih mempercayai keterangan plaintif bahawa dia memberikan wang kepada defendan untuk dipegang sebagai pemegang amanah sementara menunggu lesen perjudian diperolehi (lihat perenggan 63–65).

(6) Tidak terdapat sebarang bukti bahawa lesen perjudian telah diperolehi. Oleh itu, peristiwa yang berlaku di masa hadapan tidak berlaku yang bermaksud, defendan yang memegang wang sebagai pemegang amanah seharusnya memulangkan wang tersebut kepada plaintif (lihat perenggan 66).]

Notes

For cases on signature, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2748–2752.

Legislation referred to

Evidence Act 1950 s 114(g)
Stamp Act 1949 s 52

Ramesh NP Chandran (Ramesh Chandran) for the plaintiff.
KC Tang (KC Tang) for the defendant.

Zabariah Mohd Yusof J:

[1] The claim by the plaintiff against the defendant is for the recovery of RM1,600,000 which the plaintiff had paid to the defendant to obtain three operational gaming licenses namely, Sports Toto, Magnum 4D and Da Ma Chai 1+3D.

BACKGROUND FACTS

[2] The facts as pleaded by the plaintiff are that, on or about 8 April 2010, the plaintiff had deposited RM2,000,000 to the defendant at his office in Suite E-0911, Plaza Mont Kiara, 50480 Kuala Lumpur.

[3] The plaintiff said that this payment was to be held by the defendant (who at that point in time was acting as the plaintiff's solicitors) as stakeholder until the plaintiff succeeded in obtaining operational gaming license namely, Sports Toto, Magnum 4D and Da Ma Chai 1+3D.

[4] The amount of RM2,000,000 was paid by the plaintiff in nine cheques, all of which have been acknowledged receipt by the defendant.

[5] The defendant had deposited all the nine cheques into his accounts except one cheque in the amount of RM400,000. Hence the amount which was with the defendant pending the plaintiff obtaining his gaming license was RM1,600,000.

[6] The plaintiff maintained that he no longer was interested to obtain the gaming license and he had informed the defendant that he is claiming for the refund of the said RM1,600,000. However the defendant had refused to refund the said amount.

[7] The plaintiff subsequently through his solicitors, issued out a letter of demand dated 22 November 2010 to the defendant for the said sum and informed the defendant that as stakeholders the defendant is not to release the said sum in any event.

[8] The plaintiff through his solicitors, had also written to the defendant requesting the defendant to confirm and show proof that the said sum is still in the defendant's clients account, however to date the defendant failed to do so.

[9] Hence the claim by the plaintiff for the said sum against the defendant.

[10] The defendant in his defence stated that he admitted that he had received the RM2,000,000. He further stated that as far as the receipt of the money it was pursuant to a consultancy agreement dated 12 April 2010 ('the agreement') executed between the plaintiff and one, Dato' Frankie Ng Meng Kooi. At that point in time, the defendant was representing the plaintiff as solicitor whilst Dato' Frankie Ng Meng Kooi was represented by Messrs Gan & Tey.

[11] The defendant denied that he was the stakeholder of the said sum and stated that the same was held by Messrs Gan & Tey as solicitors for Ng Meng Kooi pursuant to cl 2(b) of the agreement which reads as follows:

> 2(b) The Consultation Fees paid herein shall be kept by the said Consultant's solicitors as stakeholder and the said Consultant's Solicitors shall be authorized to release the Consultant Fees to the Consultant in the stages as described below comprising of the initial Consultation Fees and/or the balance Consultation Fees strictly upon the fulfillment of the conditions as described in Clause 2 (b) (i) & (ii) below.

[12] Dato' Frankie Ng Meng Kooi has since passed away.

[13] The defendant pleaded that on 24 March 2010 Messrs Gan & Tey had written a latter to the defendant informing the defendant and giving to the defendant the original letter from Ministry of Finance with regards to the Forms dated 23 March 2010 to be kept by the defendant. This letter was not produced before the court.

[14] The defendant stated that the relevant letters from the Ministry of Finance informing to the plaintiff that the application for the operational gaming license all dated 24 March 2010 have been received by the Ministry and was taken note of.

[15] Subsequently on 12 April 2010 the Ministry of Finance again had written to the plaintiff informing him that the application for the gaming license of Sports Toto (M) Sdn Bhd, Pan Malaysia Pool (M) Sdn Bhd and Magnum Corp (M) Sdn Bhd have been approved.

[16] The defendant in his defence maintains that the plaintiff had signed the

agreement after the terms were read and explained to him on 12 April 2010. In other words the plaintiff had signed the agreement without any force or duress. Since the plaintiff had signed the agreement, the monies that were paid by the plaintiff had been remitted to the solicitors for the consultants, Messrs Gan & Tey in accordance to the terms in the agreement.

[17] The plaintiff on the other hand denied that he had signed any consultancy agreement or that the terms and contents of the agreement had been read over to him by the defendant.

[18] The issues:

(a) whether the plaintiff had agreed to the terms of the agreement dated 12 April 2010;

(b) whether the agreement had been read and explained to the plaintiff before he executed it;

(c) whether the plaintiff has the right to recover the sum of RM1,600,000 which had been paid to the defendant;

(d) whether the defendant had fulfilled his obligations under the agreement dated 12 April 2010; and

(e) who is the stakeholder in the agreement.

THE COURTS FINDINGS

[19] In the course of the trial the plaintiff had brought in two witnesses ie:

(a) the plaintiff himself ('PW1'); and

(b) Lim Chee Wei ('PW2')

[20] The defendant also brought in two witnesses ie:

(a) the defendant himself ('DW1'); and

(b) Mr Robin Chua ('DW2').

[21] This case revolves around the agreement which was allegedly executed on 18 April 2010 between PW1 and Dato' Frankie Ng Meng Kooi which has been marked as exh P1.

[22] The evidence of the plaintiff (PW1) is that he had engaged the defendant to represent him in a transaction to obtain gaming licenses namely Magnum 4D, Da Ma Cai 1+3D and Sports Toto operate Magnum 4D, Da Ma Cai 1+3D and Sports Toto outlets.

A **[23]** As far as the agreement P1 is concerned, according to PW1, it was prepared by the defendant. However PW1 denied that the contents of the agreement was ever read or explained to him when he was present at the lobby of the Eastin Hotel.

B **[24]** As far as PW1 is concerned, on 12 April 2010, when he was at the Eastin Hotel, he was given three pieces of white paper to sign and at that point in time PW1 said that the defendant told him that he was signing for purposes of 'transfer'. When he was asked in court as to why he signed three pieces of white paper when he should have signed an agreement, his answer was that he was C merely following what the defendant told him to do as the defendant at that point in time was his solicitor.

[25] PW1 said that he had never read nor scrutinised the contents of the agreement in P1. Moreover he said that what he wanted was that the money D that he paid to be kept by the defendant as stakeholder, pending the gaming licenses being obtained. However the agreement in P1 does not seem to provide for the same.

E **[26]** PW1 also said that the agreement in P1 does not state that the monies paid as stakeholder would only be paid out to the consultant upon him (PW1) obtaining the gaming licenses. This is necessary to protect his interest as an investor.

F **[27]** After three months from 12 April 2010, the plaintiff did not obtain any license, hence he had engaged his present solicitors to act on his behalf. As a result a letter dated 29 July 2010 was issued by the solicitors acting on behalf of PW1 to the defendant informing him not to release the money without the plaintiff's consent (p 24 of bundle B).

G **[28]** It is pertinent to note that from the evidence of PW1, he said that the cheques for the amount of RM2,000,000 were paid to the defendant on 8 April 2010 which was before the execution of the agreement of P1 (which was on 12 April 2010).

H **[29]** The defendant had said that the original licenses were ready for collection as the defendant had obtained the original licenses for Magnum 4D, Da Ma Cai 1+3D and Sports Toto.

I **[30]** From the letters at pp 2, 3 and 4 of bundle B, allegedly from the Ministry of Finance which have acknowledged the receipt of the application for the gaming license from the plaintiff, the dates of the said letters are stated as 24 March 2010. The approval of the application from the Ministry of Finance was dated 12 April 2010 which is the same date of the agreement being executed.

Payment of RM2,000,000 was made by the plaintiff to the defendant on 8 April 2010 ie before the agreement was signed.

[31] It is thus strange for the letters from the Ministry to be dated 24 March 2010 when at that point in time there had been no agreement or consensus as to the terms of the agreement at that point in time.

[32] In any event PW1 said that he was not informed by the defendant at any point in time that the defendant had received the original gaming licenses from the Ministry of Finance.

[33] PW1 also said that he met an officer from Ministry of Finance at a coffee shop in Putrajaya. Unless it is a casual meeting, it is strange for a meeting to be held at a coffee shop.

[34] PW2's evidence was that he was present at the Eastin Hotel when the alleged execution of the agreement happened. PW2 is a known to the defendant. In fact through the evidence of the defendant, he said that he dealt more with PW2 than PW1. PW2 in his testimony, confirmed that he saw the plaintiff signed three pages of white paper and that the agreement was not read nor explained to the plaintiff. PW2 also said that there was no approval letter from the Ministry of Finance shown to the plaintiff on 12 April 2010 on that day when the agreement was allegedly signed.

[35] I have no reason to doubt the evidence of PW2 and his evidence was not shaken in cross examination.

[36] DW2, Robin Chua who was also present at the Eastin Hotel on 12 April 2010 when the alleged agreement was allegedly signed by the plaintiff, said in his testimony that he is not linked to the consultant and do not know the consultant 'on a personal basis, just casual'. He said that he was invited to Eastin Hotel by Dato Frankie Ng Meng Kooi. He said that he does not know the plaintiff or the defendant. He said the late Dato Frankie Ng just told him to come over as a witness in the signing of a sale and purchase of the gaming license.

[37] DW2 came as a witness who is unsure as to what was actually signed on that fateful day of 12 April 2010, whether it was a consultancy agreement or a sales and purchase agreement. When P1 was shown too him in cross-examination, he said that he is not sure whether that was the agreement that was signed on that particular day. Earlier in his witness statement in examination-in-chief in answer to question 3, DW2 said P1 is the consultancy agreement dated 12 April 2010 which was executed between the plaintiff and Dato' Frankie Ng Meng Kooi. He was also not sure how many copies of the

agreement were signed. DW2 said that from the conduct of the plaintiff on that day of 12 April 2010, he came to the conclusion that the plaintiff understood the terms and conditions of the agreement. DW2 said that he cannot remember whether the plaintiff said that he understood the same.

[38] What is pertinent to note from the evidence of DW2 is that, he said that the plaintiff was explained on the fundamental terms of the agreement. What he meant by the 'fundamental terms' of the agreement is that the consultancy agreement is RM2m to be paid and that there is no turning back. However when it was put to him in cross-examination that only RM1,600,000 was paid, all he could say was that he was not aware of this.

[39] As far as the evidence of the defendant is concerned, he was also unsure of what happened. At first he said that the agreement was stamped but subsequently he changed his testimony by saying that the agreement was never stamped. This supports the evidence of the PW1 when he said that he was never given a copy of the stamped agreement. This is a pertinent point because by virtue of s 52 of the Stamp Act 1949, agreements which are not stamped cannot be admitted in evidence unless there is payment of late penalty and the duty is paid and is tendered in court. In our present case there is no evidence of any late penalty paid. Given the circumstances, the fact that the agreement is unstamped renders it inadmissible.

[40] The defendant was also not sure who drafted the agreement. At first, he said that the agreement was jointly drafted by him and the consultants solicitors, Messrs Gan & Tey. Subsequently he said that the truth is that the agreement was drafted by the consultant's lawyer and he just stuck by it.

[41] The defendant was not even sure who he was representing at the material time, ie whether he was representing the plaintiff or the consultant. This is evident from the letter at p 29 of bundle B (P11) where the defendant had written a letter to the plaintiff's present counsel which reads:

> We refer to the teleconversation between our counsels where we confirm:
>
> 1. That pursuant to CI. 2 (d) of the Agreement, *our clients* have agreed to extend the scope of services to include the procurement of signing the agreements with the respective operators as mentioned in CI. 1 (b) (i) (ii) and (iii) for the sum of RM 50 000.00, which is to be paid on signing of the agreements …

[42] Earlier in his evidence the defendant confirmed that the plaintiff was his client, however from the letter at p 29 bundle C, the defendant was referring to the consultants as his client. The defendant was told to explain during

cross-examination in the course of the trial, but to no avail. This can be seen from his evidence which are as follows:

Q: But you tell in this letter that you have another client?

A: Yes if I can explain that … as you already know from the correspondence, I was put in a difficult position because the consultant passed away and I suddenly found myself as the facilitator. As I have explained very clearly to the clients I was doing all I can with whatever contacts I have, to carry on to deliver what has been promised to the clients.

Q: So this letter was written by you, signed by you … as a lawyer what do you mean, your clients, who do you represent?

A: In this case the letter was written with the late consultants people in the ministry. This is where it gets a bit confusing.

[43] Clearly from the defendant's testimony above, he is confused as to his role. Why the defendant go out of his way to act as facilitator in the transaction upon the death of Dato' Frankie Ng Meng Kooi is incomprehensible. A solicitor cannot just represent both clients at the same time. That would be a conflict of interest.

[44] With regards to the money of RM1,600,000 the defendant said that the sum was kept by the consultant's solicitors Messrs Gan & Tey as stakeholder and it was never kept by him or his firm. He said that the money was paid to Messrs Gan & Tey after the meeting at Eastin Hotel. He paid it through the clients account. When asked how much did he pay to Messrs Gan and Tey, the defendant said that the amount is as stated in the agreement.

[45] When he was shown that the agreement stated the amount as RM1.8m, and the actual amount paid was only RM1.6m, the defendant said that 'I have to consult my books whether it is RM 1.8 million'.

[46] Finally the defendant changed his story and said that he thinks that the amount paid is RM1.6m.

[47] It is incredible that the defendant cannot recollect the amount of monies that he paid to Messrs Gan & Tey considering that it happened not too long ago and the amount is no small amount. One would have thought that the defendant, being an advocate and solicitor, would be armed with documents to show how much he had received and how much he had paid to Messrs Gan & Tey. In this case the defendant was giving unsubstantiated, unsure oral testimonies.

[48] Apart from the defendant's oral testimony, there was no evidence to

show that the defendant did pay out this amount to the consultant's solicitors, Messrs Gan & Tey. There was also no evidence of any correspondence between the defendant and Messrs Gan & Tey with regards to this payment of RM1,600,000.

[49] The defendant has not called Mr Gan or anybody from Messrs Gan & Tey, the consultant's solicitors to verify his story that he had made payment to Gan for the amount of RM1,600,000. The defendant also claims that Gan was present at the meeting in Eastin Hotel, but he was not in court to verify as to what had happened at Eastin Hotel.

[50] What is incredible is that the defendant also testified that the agreement works retrospectively 'as it involves the transfer of license'.

[51] The defendant in his evidence also said that Dato' Frankie Ng Meng Kooi was transferring the gaming licenses to the plaintiff. This was clear in cross examination when the defendant said that the transfer of license was Dato' Frankie Ng Meng Kooi to the plaintiff. If what the defendant said in his testimony is taken to be true, why is there no transfer agreement or a sale and purchase agreement of the gaming license prepared. What is before the court is the agreement of P1, which is not a transfer agreement neither was it a sales and purchase agreement.

[52] The defendant confirmed that he has seen photocopies of the gaming licenses which were under the Dato' Frankie Ng Meng Kooi's name, however none was ever produced before the court.

[53] Nowhere in the agreement does it state that the gaming licenses belong to the Dato' Frankie Ng Meng Kooi nor is Dato' Frankie Ng Meng Kooi selling or transferring the same to the plaintiff.

[54] Clause A at p 8 of the agreement says that the consultant is in the business of sourcing for business opportunities for individuals or corporations so as to allow individuals or corporations venturing into such business. Clause 1 of the agreement at p 8 states that the basis of the agreement and at the main task of the consultant is to assist the investor to obtain such gaming licenses as described in cl 1(b) below from the relevant authority.

[55] Further, the letters from the Ministry of Finance at P5, P6, P7, P8, P9 and P10 also did not mention anything about the licenses belonging to the consultant. There was nothing stating about any transfers of licenses either in the letters from the Ministry of Finance.

[56] When it was put to the defendant that the agreement was wrong when payment of RM1,600,000 only was made to the consultants lawyers, The defendant insisted (in the course of giving evidence in open court) that he be given the opportunity to consult his lawyers, which the court emphatically said no to his request.

[57] The defendant was asked in cross-examination whether the fact that RM1.6m was paid indicates that the agreement was wrong as the agreement mentioned payment of RM1.8m. His answer is that:

> The fact that there is commission to be paid back to one of the parties i.e. SP-2. It was he (SP 2) who brought the Plaintiff in this case. There were a lot of discussions prior to the signing of the agreement. Apart from the fees, the consultant fees include the commission which is not included in the agreement. The credibility of the agreement is that they are prepared to pay for the licenses. The figures of RM 1.8 million in the agreement is wrong. RM 400,000 was commission but this is not stated in the agreement at all.

[58] Further it is to be noted that the plaintiff had vide his solicitors (letters at p 24 of bundle B) on 29 July 2010 put the defendant on notice not to release the monies which had been paid to the defendant by the plaintiff. The defendant had replied to the letter vide his letter dated 4 August 2010 (pp 27 and 28 bundle B), however nothing was mentioned whether the monies have been released to the consultant's solicitors.

[59] The defendant mentioned that after the agreement in P1 was signed, there is a further necessity to sign another agreement ie the operative agreement where another RM50,000 was required to be paid by the plaintiff upon signing of the operative agreement. However going by the provisions of the agreement in P1, nothing is stated as to the requirement of an operative agreement which is to be signed by the plaintiff. When this question was posed to the defendant, he merely said in his testimony that:

> It started when the consultant passed away. I made a mistake in trying to facilitate this.

[60] From his evidence the defendant could not explain why.

[61] Thus from the above, it is clear that as far as the agreement is concerned, it is a sham agreement for the following reasons:

(a) there is grave doubts that PW1 signed the agreement at all. There is no initials of PW1 on every page of the agreement.

PW1's evidence was corroborated by the evidence of PW2 who also confirmed that PW1 signed on three pieces of white paper.

DW2 said that he was witnessing a sales and purchase agreement which was told to him by Dato' Frankie Ng Meng Kooi.

PW1 was told by the defendant that he was signing for purposes of 'transfer'. Mr Gan Eng Loke from Messrs Gan & Tey was not called to testify;

(b) the defendant said that Dato' Frankie Ng Meng Kooi was transferring the gaming licenses to the plaintiff. However there is no transfer agreement nor a sale and purchase agreement of the gaming license prepared. What is before the court is the agreement of P1, which is a consultancy agreement;

(c) the agreement is not a complete agreement as it does not cover the operative agreements and the commission of RM400,000; and

(d) the agreement is not stamped. Hence it is inadmissible as evidence.

[62] Therefore, after excluding the agreement, the evidence that is left for the court to consider is the sum of money which had been paid to the defendant to the amount of RM1,600.

[63] The evidence of the PW1 said that he gave the money to the defendant as stakeholder. The defendant said that Dato' Frankie Ng Meng Kooi is the stakeholder pursuant to the terms of the agreement. However the agreement is not admissible. The consultant had passed away and Mr Gan Eng Loke was not called to testify as to what actually happened, of which I draw an adverse inference against the defendant under s 114(g) of the Evidence Act 1950.

[64] I have no reason to disbelieve the evidence of PW1 as opposed to the defendant's evidence which is full of uncertainties and mostly unsubstantiated. The defendant's testimony on the whole lacks credibility.

[65] Given the circumstances of the case and the evidence that is left before the court, on a balance of probability, I am more inclined to believe the evidence of PW1 who said that he gave the money to the defendant to be held as stakeholder pending the gaming licenses being obtained.

[66] There is no proof that the gaming licenses were ever obtained. Hence the happening of the future event did not materialise which means that the defendant who held the money as stakeholder ought to return back the monies to PW1.

[67] Therefore, the claim by the plaintiff is allowed with costs of RM50,000. **A**

Plaintiff's claim allowed with costs.

Reported by Ashgar Ali Ali Mohamed **B**

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